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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JP

DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DAVID B. DURAN,

Petitioner,

v.

D. PARAMO, Warden,

Respondent.

Civil No. 12cv1313-BEN (WMC)

**ORDER DISMISSING CASE
WITHOUT PREJUDICE**

Petitioner, a state prisoner proceeding pro se, has filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Petitioner has failed to pay the \$5.00 filing fee or move to proceed in forma pauperis, and has failed to allege exhaustion of state court remedies.

FILING FEE REQUIREMENT

Because this Court cannot proceed until Petitioner has either paid the \$5.00 filing fee or qualified to proceed in forma pauperis, the Court **DISMISSES** the case without prejudice. See Rule 3(a), 28 U.S.C. foll. § 2254.

FAILURE TO ALLEGE EXHAUSTION OF STATE JUDICIAL REMEDIES

Further, habeas petitioners who wish to challenge either their state court conviction or the length of their confinement in state prison, must first exhaust state judicial remedies. 28 U.S.C. § 2254(b), (c); Granberry v. Greer, 481 U.S. 129, 133-34 (1987). To exhaust state judicial remedies, a California state prisoner must present the California Supreme Court with a fair opportunity to rule on the merits of every issue raised in his or her federal habeas petition. 28

1 U.S.C. § 2254(b), (c); Granberry, 481 U.S. at 133-34. Moreover, to properly exhaust state court
 2 remedies a petitioner must allege, in state court, how one or more of his or her federal rights
 3 have been violated. The Supreme Court in Duncan v. Henry, 513 U.S. 364 (1995) reasoned:
 4 “If state courts are to be given the opportunity to correct alleged violations of prisoners’ federal
 5 rights, they must surely be alerted to the fact that the prisoners are asserting claims under the
 6 United States Constitution.” Id. at 365-66 (emphasis added). For example, “[i]f a habeas
 7 petitioner wishes to claim that an evidentiary ruling at a state court trial denied him [or her] the
 8 due process of law guaranteed by the Fourteenth Amendment, he [or she] must say so, not only
 9 in federal court, but in state court.” Id. at 366 (emphasis added).

10 Nowhere in the Petition does Petitioner allege that he raised his claims in the California
 11 Supreme Court. In fact, he specifically indicates he did not seek review in the California
 12 Supreme Court. (See Pet. at 8.) If Petitioner has raised his claims in the California Supreme
 13 Court he must so specify. The burden of proving that a claim has been exhausted lies with the
 14 petitioner. Cartwright v. Cupp, 650 F.2d 1103, 1104 (9th Cir. 1981).

15 Further, the Court cautions Petitioner that under the Antiterrorism and Effective Death
 16 Penalty Act of 1996 (AEDPA) a one-year period of limitation shall apply to a petition for a writ
 17 of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation
 18 period shall run from the latest of:

19 (A) the date on which the judgment became final by the
 20 conclusion of direct review or the expiration of the time for seeking
 such review;

21 (B) the date on which the impediment to filing an application
 22 created by State action in violation of the Constitution or laws of the
 United States is removed, if the applicant was prevented from filing
 23 by such State action;

24 (C) the date on which the constitutional right asserted was
 25 initially recognized by the Supreme Court, if the right has been
 newly recognized by the Supreme Court and made retroactively
 applicable to cases on collateral review; or

26 (D) the date on which the factual predicate of the claim or
 27 claims presented could have been discovered through the exercise
 of due diligence.

28 28 U.S.C.A. § 2244(d)(1)(A)-(D) (West 2006).

1 The statute of limitations does not run while a properly filed state habeas corpus petition
 2 is pending. 28 U.S.C. § 2244(d)(2); see Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999).
 3 But see Artuz v. Bennett, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’
 4 when its delivery and acceptance [by the appropriate court officer for placement into the record]
 5 are in compliance with the applicable laws and rules governing filings.”). However, absent some
 6 other basis for tolling, the statute of limitations does run while a federal habeas petition is
 7 pending. Duncan v. Walker, 533 U.S. 167, 181-82 (2001).

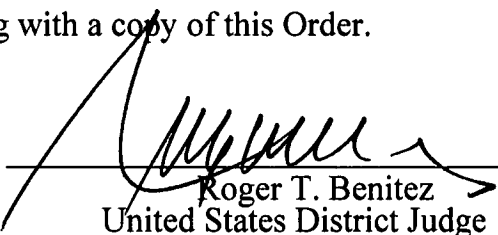
8 Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal of a
 9 habeas petition “[i]f it plainly appears from the face of the petition and any attached exhibits that
 10 the petitioner is not entitled to relief in the district court . . .” Rule 4, 28 U.S.C. foll. § 2254.
 11 Here, it appears plain from the Petition that Petitioner is not presently entitled to federal habeas
 12 relief because he has not alleged exhaustion of state court remedies.

13 CONCLUSION AND ORDER

14 Based on the foregoing, the Court **DISMISSES** this action without prejudice for failure
 15 to satisfy the filing fee requirement and failure to allege exhaustion of state court remedies. If
 16 Petitioner wishes to proceed with this case he must submit, **no later than August 1, 2012**, a
 17 copy of this Order with the \$5.00 filing fee or adequate proof of his inability to pay the fee **and**
 18 file a First Amended Petition which alleges exhaustion of state court remedies. If Petitioner has
 19 not alleged exhaustion of state court remedies on or before **August 1, 2012**, and still wishes to
 20 pursue his claims in a federal habeas petition, he will have to begin again by filing a new petition
 21 which will be assigned a new civil case number. The Clerk of Court shall send a blank Southern
 22 District of California In Forma Pauperis Application and a blank Southern District of California
 23 amended petition form to Petitioner along with a copy of this Order.

24 **IT IS SO ORDERED.**

25 DATED: 6/05/2012


 Roger T. Benitez
 United States District Judge

27 CC: ALL PARTIES